In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1407

RICHARD V. HENNINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner brought this action under the Federal Tort Claims Act to recover for personal injuries he sustained while on active duty in the United States Navy, due to the negligence of military doctors. It was stipulated that Navy doctors negligently repaired petitioner's hernia during an operation performed four days prior to his scheduled discharge from active duty. Petitioner had signed a form requesting the extension of his active duty so that he might receive continued hospitalization and medical care from the Navy, because, he alleged, he had been told his medical release from service would not be signed unless he did so. He alleges his injuries resulted in part from negligent medical treatment following surgery during this extension of duty. The district court dismissed the complaint, and the court of appeals affirmed, ruling that under *Feres* v. *United States*, 340 U.S. 135, the petitioner could not recover under the Tort Claims

Act for injuries he suffered while a member of the armed forces.

This Court held in *Feres* that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service" (340 U.S. at 146). Like petitioner, two of the claimants involved in *Feres* sustained injuries caused by the malpractice of military doctors at military hospitals.[1] The fact that petitioner's injury was sustained shortly before and in contemplation of his discharge is immaterial. The rationale of *Feres* is that in the Tort Claims Act Congress did not waive sovereign immunity "for injuries incident to military service" (340 U.S. at 144). The injury petitioner suffered as a result of surgery performed on him while he was on active duty is within that category.[2]

---

[1] Without exception, the courts of appeals have held that *Feres* bars a serviceman's claim for injuries sustained as a result of malpractice at a military hospital. See, *e.g.*, *Hall* v. *United States*, 451 F. 2d 353 (C.A. 1); *Aida Guzman DeFont* v. *United States*, 453 F. 2d 1239 (C.A. 1), certiorari denied, 407 U.S. 910; *Henning* v. *United States*, 446 F. 2d 774 (C.A. 3), certiorari denied, 404 U.S. 1016; *Lowe* v. *United States*, 440 F. 2d 452 (C.A. 5), certiorari denied, 404 U.S. 833.

[2] Despite petitioner's assertion (Pet. 2), the decision below conflicts with no decisions of this Court or of the courts of appeals. The rulings of this Court in *Brooks* v. *United States*, 337 U.S. 49, and *United States* v. *Brown*, 348 U.S. 110, indicate only that *Feres* does not apply when the injuries are sustained in an accident which occurs when the serviceman is on leave, and which is thus totally unrelated to his military service (*Brooks*), or when the injury occurs after discharge (*Brown*).

The federal courts have consistently followed the teaching of *Brooks*, *Feres* and *Brown*. In *Knoch* v. *United States*, 316 F. 2d 532 (C.A. 9), there was no recovery under the Tort Claims

Another ground of *Feres*—that an alternative method of compensation was provided—is also applicable here since, as the result of petitioner's incident-to-service injury, he is receiving a Veterans Administration pension which compares favorably to his claim for damages.[3]

Finally, the court of appeals correctly rejected petitioner's claim that the government was estopped from relying upon *Feres* because he was allegedly told, contrary to Navy regulations, that he could not be released unless the Navy repaired the hernia. As the court noted, petitioner's injury was "not cognizable under the [Federal Tort Claims] Act. and is therefore not one

---

Act when a reservist was placed on active duty simply in order to take a physical to determine his suitability for active service, and the injury occurred during the physical. The court noted that "the decision in the *Feres* case is not predicated upon the length of time an individual has been or will be on active duty, but rather upon his military status at the time of his injury." *Id.* at 534. In *Downes* v. *United States*, 249 F. Supp. 626 (E.D. N.C.), recovery under the Tort Claims Act was permitted because the injury occurred while the soldier was on a pass, and was "at his liberty to pursue his personal affairs as he saw fit at the moment of collision," *id.* at 628-629. Thus, *Brooks*, rather than *Feres*, was controlling.

Alansky v. *Northwest Airlines*, 77 F. Supp. 556 (D. Mont.), although holding that servicemen on active duty and not on leave may recover under the Tort Claims Act, was decided in 1948, two years before *Feres*, rather than in 1968, as petitioner states (Pet. iii, 19).

[3] *Feres* pointed out that the military compensation system, "which normally requires no litigation, is not negligible or niggardly, as these cases demonstrate" (340 U.S. at 145). In the present case, petitioner's damages are $17,500; he is now receiving a Veterans Administration pension of $47 a month, which on the basis of petitioner's life expectancy, will result in payments totalling $23,500 (Transcript of April 8, 1970, hearing, pp. 34-40).

to which Congress has consented. It is axiomatic that no representations by Government agents can waive the Government's immunity" (Pet. App. x).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.